No. 15,820

United States Court of Appeals

For the Ninth Circuit

BOSTON INSURANCE COMPANY,
a corporation,
Appellant,

vs.

HYRUM JENSEN, individually and doing business as Eureka Lumber Company,
Appellee.

REPLY BRIEF OF APPELLANT.

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BERNARD-WALSH PRINTING CO., SAN FRANCISCO

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ISSUES.

In its answer to the complaint and the Third Party Complaint, Appellant alleged under its terms the policy was void because: (a) Appellee submitted to fraudulent proof of loss as to the amount of stock and loss and his knowledge of the origin of the fire (17);[1] (b) Appellee did not comply with the policy conditions requiring Appellee to produce for examination all books of accounts, invoices and other vouchers or certified copies thereof if originals be lost (14-15), and to submit H. D. Jensen to an examination under oath (16), either of which is a condition precedent to recovery under the policy; (c) H. D. Jensen was a real party in interest (19) who supplied false information as to the amount of stock and loss, and

[1]Reference to the Transcript of Record.

who set the fire; (d) Appellee conspired with H. D. Jensen in submitting such false Proof of Loss, in setting the fire, and in refusing to submit said books, invoices and vouchers or copies thereof, and said H. D. Jensen did not submit for such requested examination under oath (17-19)—any of such acts alone would void the policy.

ARGUMENT.

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING BY THE JURY OF AN INCENDIARY FIRE AND THAT APPELLEE AND H. D. JENSEN ENTERED INTO A CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND BY FALSIFYING THE QUANTITY, VALUE AND DAMAGE OF THE STOCK IN THE PROOF OF LOSS (Specifications of Error I and II).

A. APPLICABLE LAW WAS ADMITTED BY APPELLEE.

The authorities for rules hereinafter mentioned were cited at pages 54, 57, 75, 76 of Appellant's Opening Brief, and are not recited here, because in his Brief, Appellee neither cited cases to the contrary nor disputed such rules.

On this appeal, as to Specifications of Error I and II, all the evidence must be viewed in the light most favorable to Appellant, all conflicts must be resolved in favor of Appellant, every inference that can reasonably be drawn from the evidence produced to show the defenses of fraud, concealment, conspiracy to defraud by submitting a false Proof of Loss or causing an incendiary fire must be drawn in favor of Appellant.

Fraud committed by an insured either by filing a false Proof of Loss as to the amount of stock and the loss or by setting a fire totally voids the policy.

A conspiracy may be formed and executed to defraud in either manner.

The burden of proving such conspiracy to defraud admittedly rests upon Appellant. In a civil case such a conspiracy is proved by a preponderance of evidence. Both the fraudulent claim and the incendiary fire are provable by circumstantial evidence.

Evidence of financial condition is admissible to establish a motive and to connect a person with a conspiracy to defraud.

B. THE CIRCUMSTANTIAL EVIDENCE DOES NOT HAVE TO EXCLUDE EACH AND EVERY OTHER REASONABLE INFERENCE POSSIBLY DERIVABLE FROM THE FACTS PROVED.

In *Hilyar v. Union Ice Co.* (1945), 45 C.2d 30, 38, 286 P.2d 21, the Court stated:

> "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom . . . (*Katenkamp v. Union Realty Co.*, 36 C.A.2d 602, 617 (98 P.2d 239).) The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved."
>
> *Chalmers v. Hawkins* (1926), 78 C.A. 733, 738, 248 P. 727.

To support the contrary proposition Appellee cited *People v. Lepkojes* (1920), 48 C.A. 654, 192 P. 160 and *People v. Angelopoulos* (1939), 30 C.A.2d 538, 86 P. 2d 873 (Appellee's Brief, p. 8). Since both decisions are in criminal actions they are inapplicable to this civil action where arson as an act of fraud

is not required to be established beyond a reasonable doubt.

Bell v. Graham (1951), 105 C.A.2d 765, 767, 234 P.2d 158;

Edmonds v. Wilcox (1918), 178 C. 222, 172 Pac. 1101.

Further, *People v. Holman* (1945), 72 C.A.2d 75, 91, 164 P.2d 297, shows that even in a criminal case Appellee's statement is erroneous because it is for the jury to determine whether any act of a person is incriminatory.

C. APPELLEE DID NOT DENY THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING BY THE JURY THAT HE CONSPIRED WITH H. D. JENSEN TO DEFRAUD APPELLANT BY FALSIFYING THE QUANTITY, VALUE AND DAMAGE OF THE STOCK IN THE PROOF OF LOSS.

1. Appellee has failed to respond to Specification of Error I in respect to Appellant's contention that there was reversible error in the trial court's refusal to submit to the jury the issue of conspiracy to defraud by filing false proof of loss as to the amount of stock and damage (See: Appellant's Opening Brief, p. 11). In Appellee's Brief, page 5, the following statement appears:

> "There is no sufficient substantial evidence to support a finding of arson. Therefore the Court properly withdrew the issue from the jury and properly excluded evidence of motive, conspiracy, fraudulent concealment of arson and false claim *based on arson* until after the basic ingredient, arson, was proved. It is the contention of the appellee that a finding that arson was properly withdrawn from the jury and not proved would dispose of specifications of error, numbers 1, 2,

4, 8 and 11, since all those specifications depend upon a prior proof of arson before they become material". (Emphasis added.)

2. It is undisputed that there was sufficient evidence to submit to the jury that the *Appellee* defrauded the Appellant by filing a false Proof of Loss as to the amount of stock and damage. This issue was submitted to the jury. Therefore, the only element required to submit a question of a conspiracy between Appellee and H. D. Jensen to defraud Appellant, by filing a false Proof of Loss as to the amount of stock and damage, is evidence reflecting the relations of the parties, the interest of the parties and the circumstances preceding and attending the culmination of the conspiracy. On pages 70-75 of Appellant's Opening Brief the sufficiency of this evidence is pointed out. By electing to base his entire argument in respect to Specification I on the assertion that the overt act of arson was not proved, the Appellee fails to deny and admits for the purpose of this appeal this separate and independent ground for reversal. The requested instruction by the jury as to whether an employer is responsible for the fraud of an employee (599) clearly demonstrates the prejudicial effect of the ruling.

D. APPELLEE HAS ADMITTED THE EXISTENCE OF EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT APPELLEE AND H. D. JENSEN CONSPIRED TO AND DID SET THE FIRE.

1. Incendiary Origin of Fire.

(a) Point of origin of fire.

At pages 1 and 2 of his Brief, Appellee admitted the point of origin of the fire was at the ground floor

level in the SW room in the east ½ of the building, where the wooden floor showed deep-seated charring. Ordinarily, this area was used to store merchandise consisting of plastic shingles and plywood (101).

(b) Inflammable liquids at point of origin.

The deep-seated charring on the floor including the edges and underside of the floor lumber showed that an inflammable fuel had been added to the floor prior to the ignition of the fire (445-446). At page 2 of his Brief, Appellee admitted that at the point of origin the fireman found an empty open topped 5 gal. container with diesel fluid odors and a 50 gal. drum partially filled with gasoline with its pump loosely affixed (440).

(i) Inflammables not usually kept at point of origin.

In phrasing this admission, Appellee made statements of fact from which a reader of his Brief would infer that mechanical work was done at the point of origin to cause the presence of grease, diesel fuel, gasoline and oil on the floor. The record below is to the contrary: Mechanical work was *not done in the SW room,* but was done on the dirt floor of the open West ½ of the building at the work bench (254) at the south wall (440, M^s on Ex. A.). The Southwest section of the West ½ of the building, had been cleared for a truck (86), and was leased to James Ragsdale to construct a sawmill (355) which was removed from the building on Saturday before the fire (370). While it had been tested, the portable sawmill in the southeast section had not been operated as a

sawmill (150), and, according to Appellee, was covered with redwood molding (141-145; 150-159). On the morning of the fire, when she was in the SW room and called H. D. Jensen from the "Kaiser" room, Bookkeeper Mrs. Ellen Van Harpen did not see any 50 gal. drum in the SW room (495). There was no evidence that any 50 gal. drum was placed in the SW room prior to the time Mrs. Van Harpen was in the SW room. In listing the contents of the rooms in the East ½ of the building, Appellee did not state any diesel fluid, grease, oil or gasoline were stored in the SW room (100-102). At page 12 of his Brief, Appellee stated:

> "Even the expert called by the Appellant saw nothing unusual in the presence of inflammables at the scene of the origin of the fire (442)."

This is a complete misstatement of the evidence transcribed at page 442. Witness Harold McBeth was not referring to the inflammable fuel on the wooden floor of the SW room. He did not testify that it was usual to have inflammable liquids on the wooden floor at the point of origin. Instead, he was pointing out that in the separated dirt floor section of the open shed portion of the building, where they had worked on the sawmill and done greasing, there was greasing material (442).

Such work area was in the West ½ of the building, completely separated from the SW room by the partition wall dividing the building in half (80, 411). No witness testified that the SW room, the point of origin, was a place where such containers were usually or ever kept.

(ii) In *People v. Gilyard* (1933) 134 C.A. 184, 189, 25 P.2d 35 and *People v. Kasparoff* (1928) 94 C.A. 7, 9-10, 270 P. 398, the Court specifically pointed out that the presence of an inflammable liquid was real evidence tending to prove the fire was of incendiary origin—rebutting any presumption of an accidental fire (Appellee's Contention pages 7-8). Even if such presumption exists it can have no bearing in a case taken away from the jury. See: *Bell v. Graham* (1951) 105 C.A.2d 765, 767.

(c) No natural causes of fire at the point of origin.

Appellee did not deny the fact that the evidence showed there were no natural sources of fire such as heating devices (445), or any electric wiring at said point of origin. In *People v. Sherman* (1950) 97 C.A. 2d 245, 217 P.2d 715, the Court specifically noted that the fact there were no natural causes at the point of origin of the fire was evidence that the fire was of an incendiary nature. At page 16 of his Brief, Appellee erroneously states that in *People v. Seltzer,* 107 C.A. 2d 627, 237 P.2d 689, the court considered "the fire was obviously of incendiary origin". To the contrary, there the evidence showed a defective light switch at the point of origin.

(i) Not necessary to show method by which fire caused.

At page 13 of his Brief, Appellee contends that Appellant has not proved any theory of the cause of the fire. To the contrary, a reading of the transcript of the records at pages 443-448 shows Witness McBeth was of the opinion that the fire was of an incendiary origin. While Witness Harold McBeth gave no opinion

as to the method used to ignite the fire or identity of the source of ignition of the fire, he pointed out, that there was a criminal agency at the point of origin; namely, an inflammable fuel had been added to the underside of the floor. He removed pieces of the flooring, and found deep seated burning on the underside of the floor boards (instead of the top of the boards). In his opinion inflammable fuel had been poured under the floor. As stated in Appellant's Opening Brief the method of igniting the fire does not have to be proved. *People v. Hays* (1950) 101 C.A.2d 305, 311, 225 P.2d 600; *People v. Maas* (1956) 145 C.A.2d 69, 75, 301 P.2d 894. The proof is sufficient when a criminal agent is found at the point of origin.

(d) Inflammable fuels placed in stacked molding.

Two open topped 1 gal. containers and a partially burned rag, all with diesel odors, were in the alleged top grade redwood molding (M^5 on Ex. A; 418-420, 437-439, Photo Ex. Z, "AA", "AJ"), where Fireman Alfred Breen found a "stubborn" fire and smelled petroleum odors (384, 386-7). No witness testified that the molding was the place where such containers were usually kept. A jury could well determine that the cans were placed in the molding to contribute to the rapid combustion and spread of the fire.

(e) H. D. Jensen fled from the building shortly before the fire was discovered.

From the Appellant's evidence the jury can reasonably find that H. D. Jensen fled from the building either immediately before or after the explosion occurred, and after the fire had started. The fact that

anyone is seen leaving a building in flight or otherwise, immediately before a fire is discovered is evidence that the fire was not naturally caused. See: *People v. Sherman* (1950) 97 C.A.2d 245, 217 P.2d 715; *People v. Holman* (1945) 72 C.A.2d 75, 164 P. 2d 297.

(f) Admission of Appellee that the fire was of an incendiary origin.

The evidentiary effect of the admitted statement by the Appellee that "somebody set it afire. We had better get an investigator" is self-evident (114).

2. H. D. Jensen Set the Fire.

(a) H. D. Jensen had opportunity to set fire.

It is uncontradicted that on the morning of the fire, all the employees who reported for work, except Bookkeeper Ellen Van Harpen, were told there was no work, and the only persons in the building the morning of the fire were Van Harpen, Appellee and H. D. Jensen (370, 494, 528). During the morning H. D. Jensen was alone at the point of origin twice. When Bookkeeper Van Harpen called him from the Kaiser room, the 50 gal. gasoline drum was not in the SW room (495); H. D. Jensen admitted handling the pump to draw gasoline for his 8 year old son's car and he left the can in the back of the car (526-528). When Bookkeeper Van Harpen left for lunch at 12:05 P.M., H. D. Jensen was alone in the building until shortly before the explosion was heard (529, 532, 261). It is uncontradicted that H. D. Jensen was in possession of diesel fuel and gasoline to pour on the floor at the point of origin (445-446).

Contrary to Appellee's assertion, there is nothing unfavorable to Appellant in the testimony of Neal A. Jensen. He did not fix the time he saw H. D. Jensen walking west on Third Avenue to Broadway. After the talk, Neal Jensen continued to load the truck. He did not see H. D. Jensen again. After Neal Jensen loaded his truck he went to the Hess Company office at the SE corner of Third Avenue and Commercial Streets, where he gave the lumber talley to Mrs. Kellam. Then he heard an explosion in the insured building and saw the smoke of the fire (396-398). Neal Jensen did not see H. D. Jensen enter or drive his pick-up away. H. D. Jensen had the opportunity to re-enter the building without being seen, and there is nothing contrary in Neal A. Jensen's testimony.

(b) H. D. Jensen fled from fire.

At page 14 of his Brief, Appellee states H. D. Jensen "drove south along Broadway to the intersection of Broadway and Third". The record is to the contrary. After he heard the explosion, Percy L. Musser, from his office at the SE corner of Third and Broadday, saw H. D. Jensen driving a GMC pickup West on Third Street from the subject building, which was approximately 300 feet from his office (260-261). At page 14, Appellee states that Musser was unable to describe the speed of H. D. Jensen's vehicle. The record shows that "very shortly" after he heard the explosion, Musser saw H. D. Jensen driving west on Third Street, and he was *going very fast* (261), and he came to a sudden stop right in front of the door". Further:

"A. He opened the door like he was going to get out about a foot, I would say. And I was on the telephone, and he closed the door. And he must have *shoved the foot throttle down to the floorboard and took off.*

Q. Would you describe the rate of speed as he continued on?

A. The rate of speed wasn't very great but the *tires was sure going around.*" (262) (Emphasis supplied.)

Then Musser saw the fire at the building (262-3), and phoned in the fire alarm (264), which was recorded at 12:21 P.M. (408). Both Neal Jensen and Percy L. Musser heard the explosion. Yet, H. D. Jensen, who was closer to the explosion than either of the witnesses, disregarded the explosion and fire. Therefore, a jury could reasonably infer that he fled from the scene of the fire. *People v. Sherman,* supra; *People v. Holman,* supra.

(c) Locked building showed no person forced entry into building to set fire.

H. D. Jensen, son of the Appellee, locked the doors of the building immediately prior to the fire and the doors were still locked at the time the fire was discovered. This was evidence that H. D. Jensen set the building on fire. *People v. Sherman,* supra; *People v. Becker* (1949) 94 C.A.2d 434, 210 P.2d 871; *People v. Kessler* (1944) 62 C.A.2d 817, 145 P.2d 656.

(d) Appellee and H. D. Jensen had financial motive to set fire.

There was evidence of their poor financial condition in the record, although material evidence in this re-

gard was ruled inadmissible (see Appellant's Opening Brief, page 76).

(e) Inconsistent statements made by H. D. Jensen.

H. D. Jensen and Appellee made inconsistent statements concerning their presence at the building on the date of the fire (see Appellant's Opening Brief, page 69). Nowhere in his Brief has Appellee answered the evidence which showed that Appellee and H. D. Jensen made inconsistent statements as to the time each left the subject building. A jury may infer a consciousness of guilt from such inconsistent statements, *People v. Hays,* supra.

3. Appellee and H. D. Jensen Conspired in Setting the Fire.

Appellant's Opening Brief sets forth at pages 70 to 75 the evidence and law establishing the conspiracy. The sufficiency of the evidence as to the conspiracy between Appellee and H. D. Jensen in connection with Specification of Error No. 1 is admitted by Appellee by his failure to respond to this assertion in Appellant's Opening Brief and by his position that Specification of Error No. 1 depends entirely on the sufficiency of evidence on the overt act of arson.

4. The Statement of the Case and Argument in Appellee's Brief Contains Erroneous, Conflicting, Misleading and Self-serving Assertions in Respect to the Sufficiency of Evidence to Support a Finding that H. D. Jensen and Appellee Conspired to Defraud Appellant by Setting the Fire.

(a) Appellee has made statements of fact for which there is no evidence in the record to support, *i.e.,* that inflammables were normally kept in the room where the fire originated (See: pp. 6, 7, above); that H. D. Jensen observed that Musser was busy on

the telephone (the evidence is that Musser was on the telephone, not that Jensen saw him); and that Jensen walked to his parked vehicle and drove away immediately after talking with customer (See: p. 11, above).

(b) Appellee has made statements that draw the inference most favorable to the Appellee. Conceding that these inferences could properly be drawn by the jury, they should be disregarded. On this appeal the court is concerned only with the inferences that could reasonably be drawn in favor of the Appellant. Therefore, the argumentative matter in Appellant's treatment of the evidence in this case is irrelevant.

(c) Appellee has made statements of fact on which there is conflicting evidence. Appellee states that the building was under insured. There is evidence in the record that included in the recent purchase price of $42,500 for the real property on which the building was located, was one block of land in the City of Eureka, California. The building occupied only 9200 square feet of the block, 4600 square feet of which was a shed with a dirt floor open to the roof and at both ends. Photographs in evidence show the antiquity of the building and its general poor condition. Considering this evidence, the portion of the purchase price reasonably allocable to the building could not possibly exceed the $10,000 insurance on the building. The Appellee states that there was uninsured personal property destroyed in the fire amounting to several thousands of dollars. Appellant was unable to offer any conflicting evidence on this issue as the trial court refused to allow Appellant to show

evidence as to the value of such property on the objection of Appellee that no claim was being made for any uninsured property. The court stated:

> "I will sustain the objection. I do not see any point in wasting time on something that is not involved (442 Ex. AB Iden.)"

The law is settled that on an appeal from a case taken away from the jury the Appellate Court should disregard any conflicting evidence, *Estate of Arnold* (1905), 147 Cal. 583, 82 Pac. 252.

5. The Evidence Offered by Appellant is Admitted to be Probative of the Fact that H. D. Jensen Set the Fire.

Appellant's Opening Brief set forth authorities which established that evidence in the record is probative that the fire was set and that it was set by H. D. Jensen and Appellee. Appellee has not denied that these cases uphold the propositions for which they were cited but has sought only to point out certain scattered segments of evidence present in those cases that allegedly are not in the record herein. Even such comparison is unsound because of the difference in the degree of proof required in a civil case.

II. THE COURT ERRED IN EXCLUDING EVIDENCE OF THE FINANCIAL CONDITION OF APPELLEE AND H. D. JENSEN.

A. AS MOTIVE FOR FRAUD IN FILING A FALSE PROOF OF LOSS AS TO AMOUNT OF STOCK AND THE DAMAGE (Appellant's Opening Brief, 17, 18).

1. The trial court decided that there was sufficient evidence to allow the jury to pass on the issue of

whether Appellee defrauded Appellant by filing a false Proof of Loss in the amount of stock and the loss. Therefore, evidence of the poor financial condition of the Appellee is admissible to strengthen and corroborate the admittedly sufficient evidence of fraud. It is undeniable that motive is admissible to prove fraud and that financial condition is admissible to prove motive. See: *Anglo California Bank v. Lazard* (1939 Cir. 9), 106 Fed.2d 693, 703; *Ross v. Wellman* (1899), 102 Cal. 1, 36 Pac. 402; *Mallett Co. v. Helbing* (1901), 134 Cal. 676, 679, 66 Pac. 967. Moreover, this obvious error in refusing to allow the introduction of this evidence is not disputed by Appellee. Appellee's statement that Specification of Error II depends on the prior proof of arson is completely erroneous. It overlooks a principal issue of this appeal. The trial court's refusal to allow evidence of poor financial condition of Appellee to establish Appellee's fraud in filing a false Proof of Loss as to the amount of stock and damage is an independent ground for reversal.

B. MOTIVE FOR FRAUD IN SETTING THE FIRE.

1. Motive is Admissible to Prove Arson.

(a) Appellee has not disputed the Appellant's citations for the proposition that motive is admissible to prove arson. Our research has not revealed a single California case in which motive was not admissible to prove that an insured was responsible for setting fire to insured property. In an analogous defense of suicide on an accident insurance policy the law is apparently well settled that motive, is not only admis-

sible to prove the insured committed suicide, but is the most important evidence in the case. See: *Kettlewell v. Prudential Ins. Co.* (1954), 4 Ill. 2d 383, 122 NE 2d 817; *Webster v. N.Y. Life Ins.* (1926), 160 La. 854, 107 So. 599; *Green v. N.Y. Life Ins.* (1921), 182 NW 808, 192 Iowa 32. Apparently, Appellee also considers financial condition of the Appellee material to the question of arson because in his Brief he emphasizes the alleged good financial condition and the alleged under insurance of the Appellee in arguing that there was insufficient evidence of arson to go to the jury. The only possible relevance of this argument is to show lack of motive to set the fire.

(b) If a foundation that the fire was of an incendiary nature need be shown before evidence of motive to set the fire is introduced, then there is more than sufficient evidence in this record to do so (see Section I.D.1. above). The Appellate Court must draw every logical inference from defendant's evidence in the record in ruling on the admission of evidence of financial condition. The Appellate Court cannot rely on the Trial Court's opinion as to the weight of the evidence when laying a foundation. The trial court was not trying the fact in this instance but ruling on a matter of law, it was for the jury to determine the fact.

(c) It was error to exclude evidence of motive on the theory that the corpus delicti of the crime of arson was not established.

(i) The trial court refused to allow evidence of motive of Appellee to set the fire on the ground

that the corpus delicti of the crime of arson had not been established. Appellee on page 17 states:

> "It is so well established that evidence of motive is not admissible until the corpus delicti has been established, that it does not require the citation of authorities."

The ruling and the statement are unsound. The doctrine of corpus delicti, developed to prevent an accused of being convicted of a crime solely on his own confession or admission, has no bearing in a civil case. Moreover, our research has not revealed any California decision, criminal or civil, holding that evidence of motive may not be introduced before a corpus delicti has been proved.

(ii) Even assuming that a corpus delicti has to be established before evidence of motive to defraud is introduced in a civil action, a corpus delicti was sufficiently established in this case. California decisions are uniform in criminal cases that, although the corpus delicti must be proved beyond a reasonable doubt, only slight or prima facie evidence need be shown to establish the corpus delicti sufficiently to introduce evidence connecting defendant with the crime. In *People v. Jones* (1898), 123 C. 65, 55 Pac. 698, the Court said that even "weak and unsatisfactory evidence" was sufficient to establish the corpus delicti. In *People v. Ives* (1941), 17 C.2d 459, 463, 110 P.2d 408, the Supreme Court stated:

> "The corpus delicti may be proven by circumstantial evidence and the reasonable inferences drawn therefrom. To warrant a conviction it must

> be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced or corroborates it or strengthens reasonable inference drawn therefrom. If a prima facie case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient."

In a criminal action, evidence connecting the defendant with the crime strengthens and corroborates the corpus delicti and supplies the additional evidence necessary to prove the corpus delicti beyond a reasonable doubt. See: *People v. Moher* (1938), 24 C.A.2d 580, 582. The effect of the court's ruling was to prevent the Appellant from presenting evidence which would strengthen and corroborate other evidence showing incendiary nature of the fire. It is clear that less proof is required to *introduce evidence* of motive of a person who set a fire than is required to allow the jury to decide whether this person actually set the fire. In an arson case only slight or prima facie evidence of the incendiary nature of a fire is required to allow the introduction of other evidence connecting defendant with the fire. Thus, in a civil case, no more than slight or prima facie evidence could be required as a foundation for the introduction of evidence of motive. Logically, no one can deny that there is at least prima facie evidence showing the fire was of an incendiary origin. Therefore, the trial court's ruling in disallowing such evidence is separate and independent ground for reversing this judgment.

III. IT WAS ERROR TO LIMIT APPELLANT'S CROSS-EXAMINATION OF APPELLEE AS TO WHETHER APPELLEE KNOWINGLY CAUSED H. D. JENSEN NOT TO SUBMIT TO REQUESTED EXAMINATION UNDER OATH ON OCTOBER 12, 1956 (Specifications of Error VI and XIII).

In his Brief Appellee has not denied that the named insured under the policy was Eureka Lumber Company; the policy provided for Examination Under Oath to protect against fraud; California law requires full compliance with the Examination Under Oath provisions; the Examination Under Oath was properly scheduled; Appellee's counsel and H. D. Jensen received actual notice of the scheduled examination and Appellee had at least imputed knowledge of such scheduled examination, H. D. Jensen failed to appear for the examination and the defense was properly raised in Appellant's answer (Appellant's Opening Brief pages 96 to 102). Appellee does not distinguish, or cite any case contrary to, *Hart v. Mechanics & Trader's Ins. Co.* (1942), 146 F. Supp. 166, 169, which held under the same policy provision that the insurer was entitled to examine an employee of the insured. Also see: *Rosenfeld v. Union Ins. Society* (1957 D.C. N.Y.), 157 Fed. Supp. 395. Appellee's statement at page 5 that "Specification of Error IV" falls if there is no evidence of arson, overlooks that H. D. Jensen's failure to appear for scheduled examination under oath was an overt act in the conspiracy to defraud by submitting false proof of loss as to stock and loss, and as to the failure to produce records supporting the stock and loss. Therefore, Appellant should have been allowed to cross examine Appellee as to whether he caused H. D. Jensen not to appear

for the properly scheduled examination; and Appellant's Motion for a directed verdict upon the ground that the uncontradicted evidence showed Appellee had not complied with this condition precedent of the policy should have been granted.

A. ERROR TO REFUSE TO STRIKE OR PERMIT CROSS-EXAMINATION OF APPELLEE ON A VOLUNTARY STATEMENT "THAT IS A LIE".

Appellee's Brief does not deny the sequence of the events surrounding the statement "That is a lie" (211-221), and his brief offers no justification for the ruling excluding the right to cross-examination or to strike the statement. Such rulings were clearly prejudicial to Appellant.

IV. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN APPELLANT'S INSTRUCTIONS RE: CONCEALMENT NOS. 8, 18, 19 AND 21 (Specification of Error X).

Nowhere did Appellee state that the form of any requested instructions was in error. Instead, he contends that there was no error in refusing such instructions because there was no evidence to show any concealment. To the contrary, the jury could have found from the evidence that Appellee was withholding information when he stated in the Proof of Loss that he did not know the cause of the fire, that there had been no change in the exposure of the property and he did not know that Appellant had requested H. D. Jensen to submit to an examination under oath (208-217).

A. APPELLANT DID NOT AGREE THAT THERE WAS NO BASIS UPON WHICH THE COURT COULD INSTRUCT RE: FRAUD OF AN EMPLOYEE BEING IMPUTED TO THE EMPLOYER (Specification of Error XI-A).

At page 6 and 7 of his Brief, Appellee states that at a consultation in the court's chambers in response to the inquiry of the jury "It was agreed that there would be no basis upon which the court could instruct on the issue of fraud of an employee being imputable to the employer and that at the conclusion of the conference the Court indicated its intention not to instruct."

Unfortunately, proceedings in chambers were not reported. Appellant made no such agreement. To the contrary throughout the trial and this appeal Appellant has contended that Appellee was responsible for the acts of H. D. Jensen relating to a fraudulent proof of loss and setting the fire. Appellant does not agree that there was no basis upon which the court could instruct that Appellee was responsible for the fraud of H. D. Jensen. A reading of the transcript where the court discussed the inquiry of the jury as to the responsibility of an employer for the fraud of an employee, shows the court did not allow an opportunity to Appellant to except to the failure to instruct on such issue (598-601). Appellee's brief does not discuss *Stockton Combined Harvester & Agr. Workers v. Glens Falls Insurance Co.* (1893), 98 Cal. 557, 33 P. 633, or *Hyland v. Miller Nat'l Ins. Co.* (1932 Cir. 9), 91 F.2d 735, where the fraud of the agent bound the insured employer.

V. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED ON APPELLANT'S PROPOSED INSTRUCTION RE: MISREPRESENTATION OR FRAUD CONCERNING THE ORIGIN OF THE FIRE NO. 24 (Specification of Error XI).

Nowhere in his Brief does Appellee state that the form of the requested instruction is in error, but he contends the jury was properly instructed on the subject of fraud.

While the Court instructed the jury that the burden was on Appellant to prove that Appellee wilfully executed a fraudulent Proof of Loss, the Court did not define the extent of the burden of proof (preponderance of the evidence, or otherwise), whether circumstantial evidence could satisfy the burden of proof or whether concealment, misrepresentation or fraud as to the origin of the fire would void the policy. Appellee has not distinguished the authorities supporting the instruction or cited any contrary authorities. Therefore, it was error to fail to submit such issues to the jury.

VI. TESTIMONY OF DAYTON MURRAY, JR. THAT EUREKA LUMBER COMPANY WAS ALLOWED A "TRADE-IN" CREDIT OF $7,500.00 ON A SAWMILL FOR THE PURCHASE OF A TRUCK AND TRAILER WAS HEARSAY AND INADMISSIBLE (Specification of Error VI).

Appellee contends the testimony did not constitute hearsay because Dayton Murray Jr. received it from the buyer and seller of the truck and sawmill. It is uncontradicted that at the time of the alleged transaction

on January 1, 1956, Dayton Murray, Jr. was neither an employee nor an officer of seller Dayton Murray Truck Sales and had not been since September, 1953 (346-358). Witness Murray, Jr. had no direct or personal knowledge of the transaction, but his knowledge was based on discussions with H. D. Jensen, and the then owner of Dayton Murray Truck Sales, W. A. Threlkeld (336). Neither Appellant nor any representative of Appellant was present at any conversation between them. Clearly, such conversations are not business records within the Uniform Business Records as Evidence Act, which refers to recorded data. Further, the error was compounded by permitting Witness Murray, Jr. to testify as to the meaning of the terms on the carbon invoice because such testimony called for an opinion, not a fact, and it was likewise based on hearsay. To the contrary on January 12, 1956, H. D. Jensen and Threlkeld executed a contract with Yellow Motors Acceptance Corporation, wherein the "trade-in-credit" for the mill was reflected at $4,000.00, only (518-519; Ex. "AO").

VII. THE COURT ERRED WHEN IT INSTRUCTED THE JURY THAT THE BURDEN OF PROOF WAS UPON APPELLANT TO PROVE APPELLEE "WILFULLY REFUSED" TO PRODUCE REQUESTED RECORDS (Specification of Error IX).

Under the express provisions of the policy, Appellee cannot recover until he has complied with all the requirements of the policy (Ex. 1). Policy lines 113-122 provide that insured "as often as may be

reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers or certified copies thereof if originals be lost at such time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

Appellee contends that unless Appellee wilfully refused to produce such records that it would not bar his recovery. In *Hickman v. London Assur. Corp.* (1920), 184 Cal. 524, 534, 195 P. 45, the Court expressly pointed out that by accepting the insurance contract the insured had agreed to the performance of the terms requiring the production of the records and "where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without his fault making it difficult or even impossible for him to perform".

Insurance Code Section 533 has no application to the failure of an insured to comply with the policy records provisions. Such section is found in Chapter VI entitled "Loss" under Article II entitled "Causes of Loss", where the Code defines "Proximate Cause" Sect. 530; "Peril not insured against" sect. 531; and "Specifically Excepted Peril", Sect. 532. Section 533, reads:

> "An insurer is not liable for a *loss caused by the wilful act of the insured;* but he is not exonerated by the negligence of the insured, or of the insured's agents or others." (Emphasis supplied.)

Clearly, the cause of this loss was fire and it was not caused by the subsequent failure to produce records.

Appellee further states "a showing of the impossibility of producing lost or destroyed records would excuse such performance". There was no evidence in the record which would show that all original invoices were destroyed or that copies could not have been obtained. Notwithstanding his statement that he "asked for suppliers invoices" the record shows that the following witnesses were not contacted by Appellee for invoices until a month before the trial of this action in the Lower Court: Harold J. Bertain (Simpson Redwood Company, formerly Eureka Redwood Lumber Company) (318, 326); Paul Henning, Manager, Rice Supply Company (301, 302); H. B. Whittet, Salesman for Western Door and Sash Company (271, 278). The trial court records show that Judge Carter permitted Appellee to take the deposition of such witnesses only upon the conditions that the invoices would be produced and shown to Appellant prior to such depositions. Contrary to Appellee's statement that no specific request for records were made by Appellant, the record shows that on October 3, 4 and 5, 1956, CPA Russell Stearns examined such records as Appellee would show him in the City of Eureka, but they did not include the records hereinafter mentioned (547, 548, 550). At the examination Under Oath of Appellee, Appellant called to Appellee's attention that certain records and invoices had not been shown Stearns; thereupon it was agreed by Appellee and his counsel that if Appellant would specify the records, Appellee would exhibit them to Stearns (209-210). On October 19, 1957, Appellant

listed and requested by letter that Appellee produce the following unproduced records: general ledger for the calendar years 1954, 1955 and 1956; accounts receivable ledger; combination cash and sales journal; all vendors invoices and statements for 1956; all sales invoices for 1956; all correspondence for 1956; all payroll records including the entire month of June, 1956; all cancelled checks of the Eureka Lumber Company for 1956, and all bank statements together with cancelled checks of Harold D. Jensen for 1955 and 1956 (Ex. AV, 547) but, Appellee still did not produce any of them.

There is no evidence in this record that any supplier other than Eureka Redwood Lumber Company, Rice Supply Company and Western Door and Sash Company was ever requested by Appellee to supply copies of invoices; or that any supplier refused or was unable to supply Appellee with invoices showing the merchandise purchased by Appellee and H. D. Jensen.

Appellee states "that no specific lists were made available (569)". The record shows to the contrary. At page 569, Appellee was cross-examining Stearns relative to the testimony of Stearns on direct examination that moneys were deposited from the Eureka Lumber Company into H. D. Jensen's bank account, and Stearns had asked for invoices to show the purchases of lumber as reflected by the amount of such deposits (559). Stearns replied that the cash books of Eureka Lumber Company recorded the money paid to H. D. Jensen; that in October, 1956, Stearns had asked Appellee's Counsel "for the invoices support-

ing the purchases that were shown as paid for to H. D. Jensen, per the cash book, which is right over there"; Stearns was told at that time that he had all the available invoices and any that showed up thereafter would be made available to him (569). However, such invoices were never made available to him, and he did not find any invoices in the records furnished him to support such purchases (560). Appellee offered no evidence to show that he had furnished the original of such invoices, or if the originals were destroyed that he had requested a copy of the invoices from the seller or that the seller was unable to furnish a copy of such invoices. In fact, the evidence shows that Mr. Hilger, who stated the records would be produced, did not tell Appellee to get the invoices for 1956 (207). Appellant was dependent upon Appellee and H. D. Jensen for the indentification of the sellers of the merchandise.

It is uncontradicted that following the fire, H. D. Jensen admitted that he had some of the books including the accounts receivable book at the home of Appellee where they lived together (546, 574, 575), which books, although requested, were never exhibited to any representative of Appellant (545, 550).

A. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTIONS NOS. 3, 5, 4 RE: CONDITIONS PRECEDENT AND DUTY OF APPELLEE TO PERFORM.

Appellee has not criticized the form of these proposed instructions. While admitting the burden of

proof is upon him to prove performance of the conditions precedent, Appellee contends that the obligation to submit to an Examination Under Oath and to produce records is a condition subsequent and he does not have to prove compliance with a condition subsequent. The law of California is settled that these requirements must be met by the insured, and are a "condition precedent to any right of action" by the insured,

Hickman v. London Assur. Corp. (1920), 184 Cal. 524, 195 P. 45;

Robinson v. National Auto Ins. Co. (1955), 132 C.A.2d 909, 912, 282 P.2d 930.

Appellee has cited no authority to the contrary.

VIII. APPELLANT WAS ENTITLED TO CROSS-EXAMINE APPELLEE AS TO HIS KNOWLEDGE OF EUREKA LUMBER COMPANY STOCK INVENTORY AS OF THE CLOSE OF BUSINESS YEAR ON DECEMBER 31, 1955 (Specification of Error V).

The Court refused to allow Appellant to examine Appellee as to the amount of stock inventory at the close of business on December 31, 1955. In support of his contention that the amount of stock inventory at the close of business December 31, 1955 was irrelevant, Appellee cited two cases which are inapplicable. In *Meyer v. Parsons* (1900), 129 Cal. 653, 62 P. 216, there was no issue as to the amount of stock on hand at the time of the fire. In *Mayers v. Alexander* (1946), 73 C.A. 2d 752, 167 P. 2d 818, the issue was the reasonable value of real property; evidence was offered of

a particular sale; and the court ruled "market value cannot be established by evidence of a particular sale."

Here there is a claimed "out of sight" loss of approximately $20,600 including 100,000 board feet of lumber (Ex. K, 248). In June, 1956, Appellee filed a financial statement with the Crocker-Anglo Bank, wherein the inventory at the close of business December 31, 1955, was stated to be $15,478.11 (Ex. AY), and a financial statement to the same bank showed the inventory at the close of business on June 1, 1956, to be $28,080.00 (571). Appellee did not know of any merchandise bought between June 1 and the fire on June 25th (200). Yet the Proof of Loss alleged the amount of stock as of June 25 to be $63,599.54. If the financial statement was accurate as to the amount of inventory at the close of business on December 31, 1955, or on June 1, 1956, then the evidence would be proof that Appellee and H. D. Jensen exaggerated the amount of insurance in the Proof of Loss by more than $35,000.00.

Therefore, knowledge of Appellee concerning amount of the inventory on hand at the close of business on December 31, 1955, was material to the defense of fraud.

IX. REFUSAL TO ADMIT IN EVIDENCE WRITTEN AGREEMENT EXECUTED BETWEEN APPELLEE, H. D. JENSEN AND OTHERS FOR EUREKA LUMBER COMPANY, WAS ERROR (Specification of Error VIII).

Appellee's contention that such documents would only be relevant or material after a "conspiracy" was proved and an act of arson established overlooks Appellee's right to recover was limited to amount of his interest in the stock, (Ex. 1, 60); under Insurance Code 381(c) Appellee was required to disclose the interest of all parties. In the Proof of Loss (Ex. K, Pr. 3), Appellee alleged the Company was the sole owner of the stock and denied anyone else had any interest. Concealment of the interest in H. D. Jensen could void the policy; it would be a ground, independent of conspiracy or employment, entitling Appellant to examine H. D. Jensen under oath; and it is material to supporting a finding of fraud, concealment and conspiracy on the part of Appellee.

X. CONCLUSION.

It is submitted that each error specified by Appellant constitutes prejudicial error when analyzed in the light of the record in the trial court and the existing case law. Appellee has failed to respond to legal principles and factual data sufficient to compel a reversal of this case.

Dated, San Francisco, California,
June 30, 1958.

Respectfully submitted,
AUGUSTUS CASTRO,
Attorney for Appellant.